In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 894

ALLEN ROTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of using the mails to obtain property by fraud in violation of 18 U.S.C. 1341 and receiving mail under a fictitious name and address to carry out his fraudulent scheme in violation of 18 U.S.C. 1342. Petitioner was sentenced to two years' imprisonment (Pet. App. B). The court of appeals affirmed (Pet. App. A).

The scheme charged was that petitioner, posing as "P. K. O'Connor, executive vice-president of Murray Corporation," represented to various manufacturers and distributors that Murray Corporation was a division of Murray Corporation of America, a large manufacturer of industrial plumbing equipment with an established credit rating. Petitioner then ordered and received merchandise on credit and subsequently refused to remit the full payment.

It was shown that "O'Connor" had represented on several occasions, either by letter or telephone, to different manufacturers that Murray Corporation was a division of Murray Corporation of America, as listed in Dunn & Bradstreet, (*e.g.*, I Tr. 169, 206-207, 339, 400).[1] In one instance, petitioner told a salesman, in person, that Murray Corporation was a regional office in the appliance rather than the industrial plumbing division of Murray Corporation of America (I Tr. 69-70). At another time, petitioner, again in person, told a sales representative that a merger was about to take place in the corporation where he was employed and that the new name would be Wallace-Murray Corporation (I Tr. 89, 93), a fact which was true insofar as Murray Corporation of America was concerned (I Tr. 80). As part of the scheme, most ordered merchandise was returned to the manufacturer. A dispute then typically developed as to whether all the merchandise had been returned and whether any money was owed by Murray Corporation.

---

[1] "Tr.", preceded by the volume number, refers to the transcript of proceedings, a copy of which is on file with the clerk.

Letters—and, in one instance, a telephone call (I Tr. 496)—with respect to the returned merchandise came from "O'Connor" (I Tr. 402-403), Roth (I Tr. 258, 553, 653); or simply Murray Corporation (I Tr. 573).

To show that petitioner was, in fact, "O'Connor," evidence was introduced that he had engaged an answering service in New York City, in the names of Roth, O'Connor, and Murray Corporation, and that, over a period of five years, petitioner was the only one who came to the answering service to obtain mail or messages addressed to any of these names (I Tr. 30). A representative of another answering service, similarly retained, testified to the same effect (II Tr. 725-731). It was further shown that, at the time of petitioner's arrest, several letters were found on his person, all addressed to "P. K. O'Connor" as vice-president of Murray Corporation.

Only one witness, Levine, stated that he had actually met with "O'Connor" in dealings with the Murray Corporation. On direct examination, Levine testified that three years earlier he met in a New York office with a man called "O'Connor" who looked like petitioner (II Tr. 839-840). The meeting lasted only five minutes (II Tr. 841).

Levine was unable to make a positive identification (II Tr. 862, 883). On cross-examination, it was disclosed that Levine had been shown nine photographs two days before he was called to testify and that he selected from them a picture of petitioner as the man who resembled "O'Connor" (II Tr. 859-860, 876). All of the photographs were introduced into evidence. Levine testified that the government did not suggest

which picture might be "O'Connor" (II Tr. 865, 867). It was also revealed on cross-examination that, on the same day he made the photographic identification Levine walked through the courtroom at the government's suggestion to see if he could identify anyone there as "O'Connor" (II Tr. 848-849). He was unable to do so at that time (II Tr. 880, 881).[3] On re-direct, Levine testified that a few hours before his testimony he again walked through the courtroom at the government's suggestion. This time he was able to identify petitioner as being the man who resembled "O'Connor" (II Tr. 891-892, 894-895). None of the out-of-court identification procedures were conducted with notice to counsel.

The court of appeals held that the photographic identification was proper because it was not "impermissibly suggestive" (Pet. App. A-6). It disapproved the walk-through identification but declined to reverse the conviction since that procedure "in no way served to shore up [the] relatively weak identification from the witness stand" (Pet. App. A-8). The court also stressed that there was ample other evidence identifying petitioner as "O'Connor." Thus,

---

[3] The sequence of the photographic identification and the first walk-through identification is unclear. Levine testified (II Tr. 873) that he could not remember whether he first walked through the courtroom or entered the witness room, where he was shown the photographs (II Tr. 857). Levine was asked who told him to go into the courtroom after he looked at the pictures. He responded only that "Mr. Doyle asked me to come in" and that he entered the courtroom by the witness room door (II Tr. 876-877). The record also suggests, as the court of appeals pointed out (Pet. App. A-5), that the court was in recess at the time of the first walk-through and that petitioner was not then in the courtroom.

as the facts summarized above demonstrate, any error as to Levine's weak identification of petitioner was harmless beyond a reasonable doubt. See *Chapman* v. *California*, 386 U.S. 18.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1970.

CERTIORARI DENIED

N.C.R.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 412193 409